Head Law 3 R. Judge Davis 1-489

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~331.~~ 1110

THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

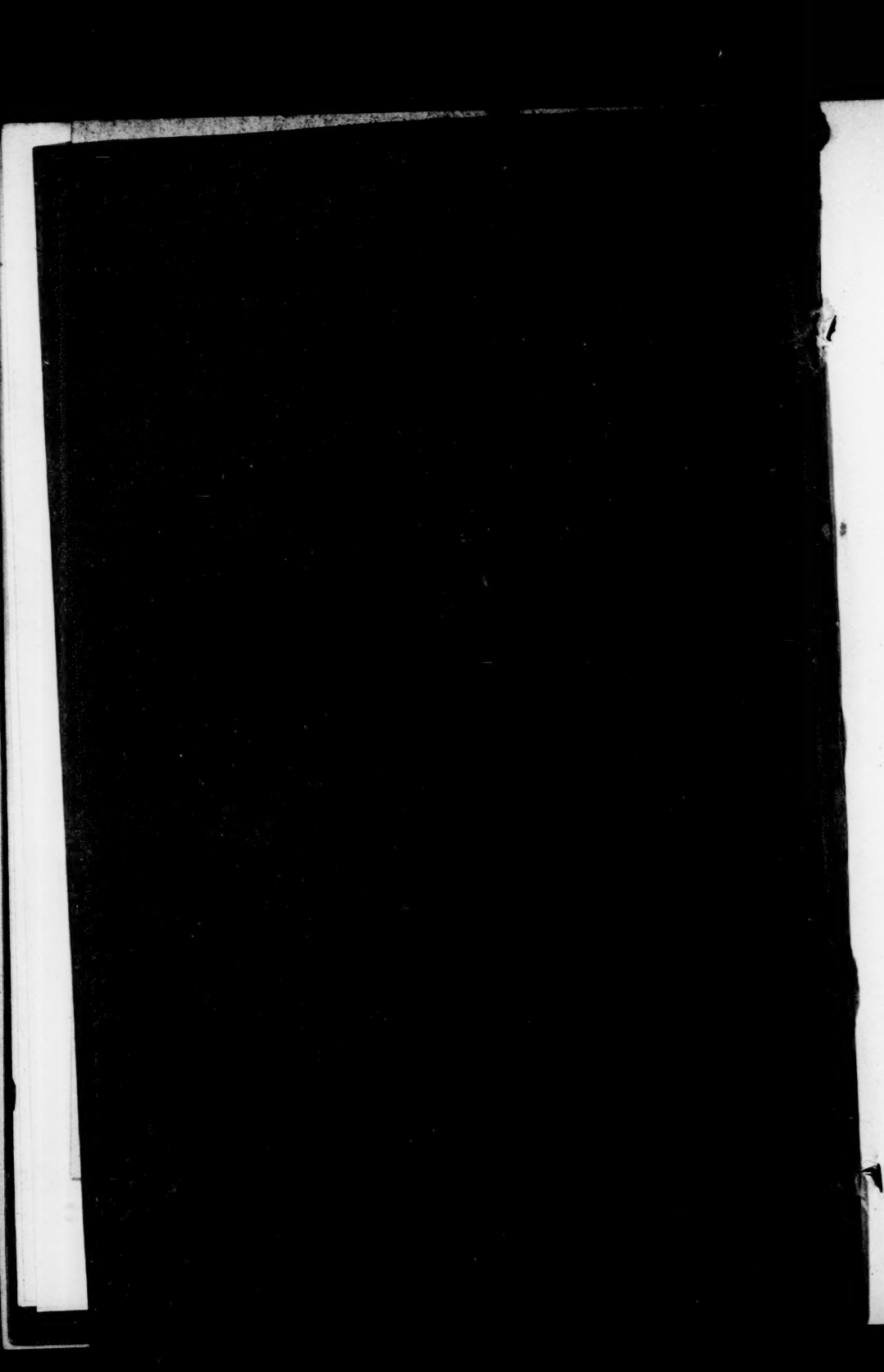
vs.

MARY A. F. ARMS AND D. D. ARMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 10, 1873.

Reversed
Davis J
writes



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1 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court-room in the city of Des Moines, in the State of Iowa and district aforesaid, on the second Monday of May, it being of the 12th day of May, A. D. 1873, before the Hon. Jno. F. Dillen, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

2 Be it remembered that heretofore, to wit, on the twenty-seventh day of March, A. D. 1872, the Milwaukee & Saint Paul Railroad Company, by its attorney Thos. Updegraff, filed in the clerk's office of the United States circuit court for the district of Iowa a transcript of removal from the circuit court of Howard County and State of Iowa, in a certain cause wherein D. D. Arms and Mary A. F. Arms were plaintiffs and the Milwaukee & St. Paul Railway Company were defendants, which said transcript is in words and figures following, to wit:

3 STATE OF IOWA,
Howard Co.:

Pleas before the circuit court of Iowa, at a term begun and holden in the county of Howard on the 30 day of October, 1871, the Hon. M. V. Burdick, judge of the first circuit of the 10th judicial district of the State of Iowa.

D. D. ARMS & MARY ARMS
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMpany. } Ss. At law.

Be it remembered that heretofore, to wit, on the 14 day of February, A. D. 1871, a petition was filed in the office of the clerk of the circuit court in & for the county of Howard, in the words & figures following, to wit:

Petition.—Feb. term, 1871.

In circuit court Howard Co., Iowa.

D. D. ARMS & MARY A. F. ARMS
against
MILWAUKEE & ST. PAUL RAILWAY COMPANY.

4 The said plaintiff respectfully shows to the court that they are now, and have been for several years last past, husband and wife; the said defendant is a corporation doing business in said county and in Northern Iowa, by running and operating a railroad therein, which road passes through the said county, in the business of carrying passengers and freight upon their said railroad; that on the 12th day of October, 1870, the said plaintiff Mary A. F. Arms purchased a passenger-ticket at McGregor, in said State, of the said defendant, whereby the said defendant agreed and undertook to carry her safely from McGregor to Cresco, in said county; that while the said Mary A. F. Arms was riding on said cars as a passenger, pursuant to the above-mentioned contract, and while the said cars were passing through Clayton County, in said State, on the said 12th day of October, the said defendant did so negligently & carelessly run & operate its said cars that the train thereof came in collision with another train of the said defendant

5 on said railway, and by said collision the said plaintiff, Mary A. F. Arms, without her fault or neglect, was thrown violently against the stove in said car, whereby her hands and wrists were severely burned and her spine and right hip severely wrenched and injured, to the damage of the plaintiff in the sum of five thousand dollars.

2nd. The plaintiffs further show that in consequence of the injuries by said Mary A. F. Arms sustained, as above set forth, they have necessarily expended much time and money in attempting to obtain cure and relief of the pain and suffering caused by said injuries to the said plaintiff & in employing the aid of physicians therefor, to the damage of said plaintiff in the further sum of three thousand dollars.

3rd. And the said plaintiff, D. D. Arms, in his own behalf, further
6 shows, that in consequence of the injuries sustained by the said Mary A. F. Arms as aforesaid, he has been since the said 12th day of October, and now is, deprived of the comfort, society, aid, and assistance of his said wife, to his damage in the sum of two thousand dollars.

Wherefore the plaintiffs ask judgment against said defendant in the sum of ten thousand dollars, to wit: eight thousand dollars in favor of said plaintiff and two thousand dollars in favor of D. D. Arms, besides costs.

C. E. BERRY & H. A. GOODRICH,
Plff. Atty.

On the back of which is the following, to wit: "Filed in my office this 14 day of February, A. D. 1871. S. A. Stone, clerk D. C."

And afterwards there was filed in the office of the said clerk a notice, in the words and figures following, to wit:

In circuit court for Howard Co., Iowa.

7 *Original notice.*

D. D. ARMS & MARY A. F. ARMS
against
THE MILWAUKEE & ST. PAUL RAILWAY COMpany.

To the defendant above named:

You are hereby notified that there is now on file in the office of the clerk of the circuit court in & for the county of Howard, State of Iowa, a petition of D. D. Arms & Mary A. F. Arms, plaintiff above named, claiming of you the sum of ten thousand dollars for injuries done to the said Mary A. F. Arms while a passenger on your train on the 12 day of October, 1870; and you are also served with a copy of said petition; and that unless you appear thereto & defend before noon of the second day of the next term of the said court appointed to be held at the said court-house, in said county, commencing on the 27 day of February, 1871, your default will be entered and judgment rendered
8 against you therein in accordance with the prayer of said petition.

C. E. BERRY & H. A. GOODRICH,
Attys. for Plff.

STATE OF IOWA,
Howard County:

I hereby certify that the within notice was rec'd by me for service Feb. 15, 1871, and that I personally served the same L. F. Woodcock,

agent of the Milwaukee & St. Paul Railway Co., at Cresco, in Vernon Springs Township, in said county, on the 15th day of Feb., 1871, by reading the same personally to said L. F. Woodcock, agent of Mil. & St. Paul Railway Co., & delivered said L. F. Woodcock, agent, personally, a copy of said notice, together with a copy of plff. petition in this action, at same time & place above stated.

J. F. POWELL, *Sheriff.*

Fee: Serv., 50; copy, 10; mile, 10—70.

And afterwards, to wit, on the 7 day of July, 1871, there was filed in the office of the said clerk an answer, in the words & figures following, to wit:

9 *Answer.*

In circuit court, Howard Co., Iowa, July term, 1871.

D. D. ARMS & MARY A. F. ARMS
vs.
THE MILWAUKEE & ST. PAUL RAILWAY CO.

And now comes the defendant, for answer to plaintiffs' petition denies each & every allegation therein contained & set forth.

F. UPDERGRAFF & R. NOBLE,
Defts. Atty.

On the back of which is the following, to wit: "Filed in my office this 7' day of July, 1871. S. A. Stone, clerk."

And afterward, to wit, on the 2 day of November, 1871, there was filed in the office of the said clerk a petition for removal, in the words & figures following, to wit:

Petition for removal.

In circuit court of Iowa, in & for Howard Co.

D. D. ARMS & MARY A. F. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILWAY Company, defendant.

10 To the circuit court aforesaid:

Your petitioner, the Milwaukee & St. Paul Railway Company, respectfully state to the court that an action has been commenced and is now pending in the circuit court aforesaid, by D. D. Arms & Mary A. F. Arms, as plaintiff, against your petitioner. That said plaintiff, Mary A. Arms, is a citizen of the State of Iowa; that your petitioner, the Milwaukee & Saint Paul Railway Company, is a citizen of the State of Wisconsin, incorporated by that name by the laws of the State of Wisconsin, and has its principal place of business therein; that the matters in dispute in said cause exceed the sum of five hundred dollars, exclusive of costs, the damages claimed by said plaintiff being laid in her petition at two thousand dollars; that special bail was not originally required in said action; that the controversy in said suit is between a citizen of Iowa and a citizen of the State of Wisconsin.

11 Your petitioner therefore asks for the removal of said cause for trial into the next circuit court of the United States, to be held in the district of Iowa; and your petitioner now here offers good and sufficient security for its entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, & other proceedings in said suit.

THE MILWAUKEE & ST. PAUL
RAILWAY COMPANY,
By NOBLE, HATCH & FRESE,
Plaintiffs' Atty.

I do solemnly swear that I am agent of the defendant in the above-entitled cause; that I am acquainted with the statement in the foregoing petition, & that the same are true; that I have reason to & do believe that from prejudice or local influence the said defendant in said cause will not be able to obtain justice in the circuit court of Iowa, where the same is now pending.

L. F. WOODCOCK.

12 Sworn to and subscribed before me by L. F. Woodcock, in my presence, this 30' day of October, 1871.

S. A. STONE, *Clerk.*

On the back of which is the following, to wit: "Filed in my office this 2' day of Nov., 1871. S. A. Stone, clerk C. C."

And afterward, to wit, on 2' day of Nov., 1871, there was filed in the office of the said clerk a bond, in the words and figures following, to wit:

Bond.

In the circuit court of Iowa, in & for Howard County.

D. D. ARMS & MARY A. D. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILWAY Company, defendant.

Comes now the said defendant, the Milwaukee & Saint Paul Railway Company, as principal, and Oscar Burdick as surety, and acknowledge themselves to owe and be indebted to said plaintiffs, D. D. Arms & Mary A. F. Arms, in the sum of ten thousand dollars, for the payment of which we bind ourselves, our heirs, successors, & representa-
13 tives, upon the condition, however, that whereas the said defendant has filed its petition in said court, asking the removal of said cause for trial to the next circuit court of the United States for the district of Iowa:

Now, therefore, if said petition shall be granted and said defendant shall enter in said circuit court on the first day of the session copies of all process, pleadings, depositions, testimony, & other proceedings in said cause or suit, then their bond to be void, otherwise of force.

Dated October 30, A. D. 1871.

THE MILWAUKEE & SAINT PAUL
RAILWAY COMPANY,
F. UPDEGRAFF, *Atty.*
OSCAR BURDICK.

The above bond examined & approved this 2 day of Nov., A. D. 1871.

M. V. BURDICK,
Judge Circuit Court, Howard Co., Iowa.

On the back of which is the following, to wit: "Filed in my office this 2 day of Nov., 1871. S. A. Stone, clerk C. C."

14 In circuit court, Howard County, Iowa.

D. D. ARMS & MARY A. F. ARMS
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Be it remembered that this cause was commenced in the said court at the February term for 1871, & was continued from term to term until the October term for 1871, at which term the plffs. appeared by C. E. Berry & H. A. Goodrich, their attys., & deft. by Thos. Updegraff, his atty.

And now, on this 2nd day of Nov., 1871, it being the fourth day of the Oct. term of our circuit court, the deft., by his atty., filed with the said court a petition praying for the removal of this cause to, & to be tried in, the next circuit court of the United States to be held in the district of Iowa. And the deft. also filed a bond with, & which was approved by, the said court, to insure the prosecution of this cause in the said U. S. circuit court. And the court, after considering the
15 evidence thereupon, ordered that this cause be removed to the said U. S. circuit court in the dist. of Iowa.

STATE OF IOWA,
Howard County, ss:

I, S. A. Stone, clerk of the circuit court in & for said county, hereby certify that the foregoing is a true & complete transcript of all the pleadings, depositions, testimony, & proceedings in the above-entitled cause, which appear on file or of record now in my office.

Witness my hand & circuit court seal this 19 day of Mar., 1872.

S. A. STONE,
Clerk C. C.

Filing petition	$1 50
Taxing costs	50
Entering satisfaction	25
Continued, Feb. term	15
" May "	15
" July "	15
May 19, '72, transcript	2 00
Certificate & seal	50
Serving original notice	70
" subpœnas	30
" "	30
" "	2 20
Total plffs.' witness	30 20

I certify the above to be a correct list of fees, as appears of record in my office.

S. A. STONE,
Clerk C. C.

(Endorsed:) Filed March 27, 1872. George B. Corkhill, clerk.

16 And afterwards, to wit, on the 14th day of May, A. D. 1872, there was filed in said clerk's office in said cause an amended petition, which said amended petition is in words and figures following, to wit:

17 EXHIBIT A.

In the circuit court of the United States for the district of Iowa, by change of forum from Howard circuit court of the State.

D. D. ARMS & MARY A. F. ARMS
vs.
THE MILWAUKEE & ST. PAUL RAILROAD COMPANY.

To the said circuit court of the United States for the dist. of Iowa:

Your petitioners, D. D. Arms and Mary A. F. Arms, shew to the court that they are citizens of the State of Iowa, and that the defendant, The Milwaukee & St. Paul Railroad Company, is a body-corporate organized & existing under the laws of Wisconsin, and a citizen of said State; that this suit was brought by plaintiff against said defendant in the circuit court of Howard County, State of Iowa, and upon peti-
18 tion and affidavit of said defendant the jurisdiction of the same changed to this court; and a transcript of the record in said cause has been filed in this court.

Whereupon plaintiffs come now and shew to this court that the said defendant, The Milwaukee & St. Paul Railroad Company, are justly indebted to plaintiffs upon the several matters hereinafter set forth in the sum of ten thousand dollars, and for cause of such claims shews:

That heretofore, to wit, on the 12th day of October, 1870, and before and since that time, the said defendant was a body-corporate as aforesaid, and was engaged in the business of operating certain lines of railroad by the use of steam for the transportation of passengers, of freight; and, among other lines of railroad operated by defendant as aforesaid, defendant was engaged in carrying passengers & freight as aforesaid on a railroad from the town of McGregor to the town of Cresco, in the State of Iowa.

That on said 12th day of October, 1870, the plaintiff, Mary A. F. Arms, being then & there the wife of D. D. Arms, the other
19 plaintiff herein, purchased a ticket on defendant's railroad, from the ticket-agent of defendant, at the said town of McGregor, to be thence conveyed to said town of Cresco, in Howard County, aforesaid, and that defendants then and there undertook to convey the said Mary A. F. Arms from McGregor to Cresco aforesaid, and to use all due care and diligence to transport her safely to her said place of destination.

Plaintiffs show that while the cars of defendants, upon which said Mary A. F. Arms was a passenger, were in motion and passing through Clayton County, between the points aforesaid, and while the said Mary A. F. Arms was a passenger on the same as aforesaid, the defendants, wholly neglecting their undertaking and disregarding their duty in the premises, by their servants and agents were guilty of gross carelessness and negligence in the premises, and caused and permitted the train upon which said Mary A. F. Arms was a passenger as aforesaid, and one engine and tender upon the same road coming in an opposite
20 direction and under the controll of the servants and agents of

defendants, to collide with each other, whereby, and without any fault of plaintiff, the said Mary A. F. Arms was thrown from the seat with great violence, and was thrown upon and against the stove in said cars, and her hands and arms were severely burned, and her spine and right hip severely and permanently injured, and she was caused to miscarry and have a premature childbirth.

That since that time, by reason of said injuries, she has been confined to her bed and her room, and has suffered great bodily pain and mental anguish; that, prior to the said injuries, she was able to earn large sums of money in teaching, and was able to provide for herself and family and to take care of her children, but that by reason of said injuries she has, since the same were received as aforesaid, been wholly disabled from performing any work or labor, or from teaching, and that said injuries are permanent, and plff. have paid out large sums of
21 money for medical attendance, and that, for the remainder of her life, she must continue to be disabled and unfitted for any work or labor whatever, & must employ care & attention at great expense.

Wherefore plaintiffs have been damaged, to wit, in the sum of eight thousand dollars.

2ND COUNT.—And the said D. D. Arms, in his own right, shows and avers, for a further and additional cause of action against the said defendant, that he is the husband of the said Mary A. F. Arms, and was her husband at and prior to the 12th day of October, 1870, and since that time.

That by reason of the fault and negligence of defendant and the failure of defendant to perform the said undertaking to safely convey his said wife, as set out in the first count of this petition, to wit, in the sum of two thousand dollars.

Wherefore plaintiffs ask judgment upon the several causes of action, as aforesaid, to wit, in the aggregate sum of ten thousand dollars and costs of suit.

22 NOURSE & KAUFFMAN.
With whom are—C. E. BEBRY &
H. A. GOODRICH,
Attorneys for Plff.

(Endorsed:) Filed May 14, 1872. George B. Corkhill, clerk.

23 And afterwards, to wit, on the 20th day of May, *A* in the May term, A. D. 1872, of said court, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

24 Circuit court of the United States, district of Iowa, May term, A. D. 1872. Monday, May 20, 1872.

D. D. ARMS & WIFE
vs.
THE MILWAUKEE & ST. PAUL R. R. COMPANY. } No. 1206. Law.

This cause coming on for hearing, plaintiff appears, by Nourse & Kauffman, and files a new petition herein, and, upon motion of plaintiff, it is ordered that defendants answer the same by July 1st, and that clerk send the defendant a copy of the new petition.

25 And afterwards, to wit, on the 2d day of Oct., A. D. 1872, there was filed in said clerk's office, in said cause, the defendant's an-

swer to the plaintiffs' petition, which said answer is in words and figures following, to wit:

26 *Answer.*

In the circuit court of the United States for the district of Iowa, by change of forum from Howard circuit court, of the State of Iowa. Term 1872.

D. D. ARMS & MARY A. F. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILROAD Company.

The defendant says that, for answer to the plaintiffs' petition in their action, they deny each and every allegation therein contained; wherefore they demand judgment for costs.

THOMAS UPDEGRAFF,
Atty. for Deft.

(Endorsed:) Filed Oct. 2, 1872. George B. Corkhill, clerk.

27 And afterwards, to wit, on the 16th day of October, 1872, there was filed in said clerk's office, in said cause, an affidavit for continuance, which affidavit is in words and figures following, to wit:

28 *Affidavit for continuance.*

In the circuit court of the United States for the district of Iowa, Oct. term, 1872.

MARY A. F. & D. D. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILWAY Company.

I, Thos. Updegraff, do solemnly swear that Mrs. Mary Murray resides at the village of New Oregon, Howard County, Iowa, more than 100 miles distant from the city of Des Moines, Iowa; that ten or twelve days prior to the 26th day of September, 1872, I caused to be served on the plaintiffs in this cause a notice that the deposition of Mary Murray and other witnesses would be taken at Cresco, Howard County, Iowa, three miles from New Oregon aforesaid, before H. F. Reed, a notary public, on behalf of the defendant, on the 26th day of September, 1872; that, on the 26th day of September, 1872, C. E. Berry being ill, he being plaintiffs' counsel, the taking of said depositions was postponed by stipulation until October 1, 1872; that on the 1st day of October, 1872, I despatched a messenger from Cresco to New Oregon for said Mrs. Murray, and
29 proceeded with the taking of the depositions of other witnesses; that while so doing, and while the said messenger was on his way, I noticed said Mrs. Murray getting upon an eastward-bound train. I immediately procured and sent a subpœna, which is hereto attached; that said Mrs. Murray refused to obey said subpœna or to remain and testify, but informed this deponent that she had just received a message calling her to the sick bedside of a daughter at Lyons, Iowa, and said Mrs. Murray departed on said train before any compulsory process

could be obtained; that I expect to prove by said witness Mrs. Murray the following facts:

That she is now and has been acquainted with the plaintiff, Mrs. Arms, for more than 12 years; that about 4 years of that term said plaintiff lived in Missouri; that she returned from Missouri early in October, 1870, by rail from McGregor, Iowa, to Cresco, Iowa; that said witness saw said plaintiff at plaintiff's father's house on the day of her return from Missouri to New Oregon, Iowa; that said plaintiff's mother
30 was at that time sick and helpless; that on that day said plaintiff told said Mrs. Murray that she had come home to wait on her mother, and that an accident to the cars had detained her one day; that Mrs. Murray then asked Mrs. Arms if she had suffered any injury by the accident; that Mrs. Arms replied that she was thrown forward, but saved a fall by throwing her hands on the stove and burning her wrist a little, and that this was all the injury she received; that Mrs. Arms at that time looked well and seemed to feel well, and was talkative, lively, and in high spirits, and that Mrs. Murray congratulated her on her escape with so slight injuries.

That 2 or 3 days after this visit Mrs. Murray called again to see Mrs. Arms' mother, and found Mrs. Arms there doing the house-work, and the work of taking care of her mother; that Mrs. Murray had personal knowledge of her doing the work; that while working around the cook-stove, which was some broken, she complained of her father for not getting a better stove instead of buying New Oregon lots; that Mrs. Arms then made no complaint of being unwell or indisposed
31 and had every appearance of being in good health and hard at work; that for the first two months after Mrs. Arms' return from Missouri said Mrs. Murray saw her at her father's house as often as once a week when Mrs. Murray called to visit the sick mother; that during all this time Mrs. Arms made no complaint whatever of any disability or illness, and done the ordinary house-work and waited on her mother, and appeared well and hearty in all respects; that some time after the expiration of 2 months after her return from Missouri to New Oregon Mrs. Arms informed the said witness Mrs. Murray that the shock in the cars had brought on her monthly periods and sprained her ankle so that she was lame, but made no other complaint or explanation. That I, the affiant, believe these facts, which Mrs. Murray is expected to prove on trial, and I know of no other witness by whom they can be so fully proved.

32 I further state that on the 25th day of September, 1872, the *the* annexed notice or the original thereof was served on the defendant for the taking of the depositions of Mrs. Gray, Mrs. Munson, Mrs. Puhlman, Mrs. Culver, and others; that on the day named therein, although the defendant attended at the time and place named in said notice, yet the plaintiff wholly neglected to produce or take the testimony of any of the witnesses named in said notice & which are hereinbefore named. That said Mrs. Gray, Mrs. Munsen, and Mrs. Culver are material witnesses for defendant in this action. That this was not known to defendant until October 1st, 1872, at which time defendant would have procured the deposition of said Mrs. Grey but for the belief that plaintiff would examine her as a witness; that defendant was mislead by the said notice of plaintiffs and their neglect to take Mrs.
33 Grey's testimony until it was too late to procure her deposition.

That I expect to prove by Mrs. Gray that Mrs. Arms, during most of the time for 2 years after Oct. 12, 1872, was in good bodily

health and done most of the house-work in her father's house during much of that period.

That said Mrs. Gray has seen Mrs. Arms almost daily since that time, and that during that period she has known Mrs. Arms on more than one occasion, when neighbors were seen coming towards the house, to suddenly quit her work and betake herself to bed and pretend to be sick while the caller remained, and after the departure of the caller to get up and resume her work.

That I believe these facts to be true, and that I know of no other witness by whom the same can be so fully proved. That said Mrs. Gray resides near or in New Oregon, Howard County, Iowa, more than
34 100 miles from the city of Des Moines, Iowa. That if the cause is continued, the known place of residence of said witnesses will enable the defendant to procure their testimony by deposition for the next term of this court.

THOS. UPDEGRAFF.

Subscribed & sworn to by Thos. Updegraff, before me, this 16 day of October, 1872.

GEORGE B. CORKHILL,
Clerk U. S. C. C., Dist. Iowa.

35 Mrs. MURRAY:

MADAM: You are notified to be and appear ferther before me at my office, Cresco, Iowa, to testify as a witness in a cause pending in the circuit court of U. S. for dist. of Iowa, wherein Mary A. F. & D. D. Arms are plff'., and Mil. & St. Paul R'y Co. *are* defts., said deft. being now taking depositions before me as notary public of Howard Co., Iowa, to be used in said cause.

H. F. REED, *N. P.*

I, Thos. Updegraff, do solem'ly swear that on the 1st day of Oct., 1872, at Cresco, Howard County, State of Iowa, I served the above subpœna on Mrs. Murray by reading the same to her, and she demanded no fee.

THOS. UPDEGRAFF.

Sworn to and subscribed before me this 16 day of October, 1872, by Thos. Updegraff and in my presence.

GEORGE B. CORKHILL, *Clerk.*

(Endorsed:) Filed October 16, 1872. George B. Corkhill, clerk.

36 And afterwards, to wit, on the 17th day of October, it being of the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

37 Circuit court United States, district of Iowa, October term, 1872, Thursday, Oct. 17, 1872.

D. D. ARMS & WIFE
vs.
MILWAUKEE & ST. PAUL R. R. COMPANY. } No. 1206. Law.

This cause coming on for hearing upon defendant's application for a continuance herein, plff. appears by Nourse & Kauffman, and deft. by Updegraff, and the court, being advised in the premises, sustains said application at defendant's costs, and the cause is continued.

38 And afterwards, to wit, on the 23d day of May, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said cause, appears the following entry, to wit;

Circuit court of the United States, district of Iowa, May term, A. D. 1873, Friday, May 23d, 1873.

D. D. ARMS & WIFE
vs.
MILWAUKEE & ST. PAUL R'Y CO. } No. 1206. Law.

This cause coming on to be heard, plff., before trial, has leave to strike out name of D. D. Arms as co-plaintiff as to first count of the petition, and the cause to proceed accordingly. Plffs. appear by Nourse & Berry, and defts. by Thos. Updegraff. Then came a jury of twelve good and lawful men, to wit, W. V. Lucas, C. D. Skinner, H. H. Smith, M. G. Tullis, Wm. Sharon, D. G. McCloud, Cheista Wright, H. Wilkinson, Hugh R. Lyon, T. A. Prest, James McAuley, W. H. Penn, who were duly empanneled and sworn to try the issues in this case, and a true verdict render according to the law and evidence given them in
39 court, and they, having heard part of the evidence, were excused till 9 o'clock to-morrow morning.

And afterwards, to wit, on the 24th day of May, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

Circuit court of the United States, district of Iowa, May term A. D. 1873, Wednesday, May 24, 1873.

D. D. ARMS AND MARY A. F. ARMS
vs.
THE MILWAUKEE & ST. PAUL R'Y CO. } No. 1206. Law.

This cause came on this day to be further heard. The parties appear by their attorneys, and the jury came, the same as yesterday, and they, having heard the evidence, arguments of counsel, and charge of court, retired to a private room under charge of a sworn officer to consider their verdict, and, after some time spent in deliberation thereon,
40 they return into open court the following verdict, to wit:

"We, the jury, find for the plaintiff, Mary A. F. Arms, under the first count of the amended petition, marked "A," and fix the damages at four thousand dollars ($4,000.)

(Signed) "M. G. TULLIS,
"*Foreman.*"

"And we, the jury, further find for the plaintiff, D. D. Arms, under the amended petition, marked "A," and fix the damages at one hundred dollars.

(Signed) "M. G. TULLIS,
"*Foreman.*"

41 And afterwards, on the 4th day of June, A. D. 1873, there was filed, in said clerk's office, a motion for new trial, which motion is in words and figures following, to wit:

42 *Motion for new trial.*

In the circuit court of the United States for the district of Iowa.

MARY A. F. ARMS AND D. D. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILWAY Company.

Comes now the defendant in the above-entitled cause and moves the court to set aside the verdict and grant a new trial in said cause for the following reasons, viz:

1st. For error of law on the trial, to wit:

I. Because the court erred in instructing the jury that if they found the evidence that the negligence of the defendant was gross negligence, they might give punitive damages against defendant.

II. For that the court erred in instructing the jury that "the form of the verdict for the plaintiff will be as follows: We, the jury, find for the plaintiff, Mary A. F. Arms, under the first count of the amended petition, marked "A," and fix the damage at $.

43 "We, the jury find for the plaintiff, D. D. Arms, under the amended petition, and fix the damages at ."

THOS. UPDEGRAFF,
Atty. for Deft.

(Endorsed:) Filed June 4, 1873. George B. Corkhill, clerk.

44 And afterwards, to wit, on the 5th day of June, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

May term A. D. 1873, Thursday, June 5, 1873.

MARY A. F. ARMS, D. D. ARMS
vs.
MILWAUKEE & ST. PAUL RAILWAY CO. } No. 1206. Law.

This cause came on this day for hearing upon deft.'s motion for a new trial herein, and the court, being advised, orders that said motion be, and the same is hereby, overruled.

Thereupon it is ordered that plaintiffs have judgment upon the verdict of the jury heretofore rendered herein. It is therefore considered and adjudged that plaintiff Mary A. F. Arms have and recover of and from defendants, the Milwaukee & St. Paul Railway Company, the sum of four thousand dollars, with interest and cost of suit taxed at $, and that execution issue therefor.

45 It is further ordered and adjudged that plaintiff D. D. Arms have and recover of and from said defendant the sum of one hundred dollars, with interest and costs of suit taxed at $, and that execution issue therefor.

Thereupon defendant, by its atty., in open court, prayed a writ of error to the Supreme Court, which is allowed. It is further ordered that, by consent of counsel, *that* the said writ shall operate as a supersedeas, provided a good and sufficient bond, with sureties to be approved by the clerk of this court, be filed within sixty days from this date.

46 On the same day, to wit, the fifth day of June, A. D. 1873, there was filed, in said clerk's office, an assignment of errors, which assignment is in words and figures following, to wit:

47 *Assignment of errors.*

In the circuit court of the United States for the district of Iowa.

MARY A. F. ARMS & D. D. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILWAY Company.

Comes now the said defendant and says there is manifest error on the face of the record, apparent in this cause, in the following matters:

1st. The court erred in instructing the jury that they might find punitive or exemplary damages.

2nd. The court erred in instructing the jury that they might separate verdicts or amounts for two separate and distinct plaintiffs, on two separate and distinct causes of action in the same case.

3rd. The court erred in overruling the motion of defendant for new trial.

4th. The court erred in overruling the motion of defendant in arrest of judgment & for a repleader.

THOS. UPDEGRAFF,
Of Counsel for Deft.

(Endorsed:) Filed June 5, 1873. George B. Corkhill, clerk.

48 On the same day, to wit, the 5th day of June, A. D. 1873, it being of the May term, A. D. 1873, of said court, the defendant, by its attorneys, filed in said clerk's office its bill of exceptions, which bill of exceptions is in words and figures following, to wit:

49 *Bill of exceptions.*

In the circuit court of the United States for the district of Iowa.

MARY A. F. ARMS & D. D. ARMS
vs.
THE MILWAUKEE & SAINT PAUL RAILWAY Company.

Be it remembered that at the May term, A. D. 1873, of the court aforesaid, begun and held at the city of Des Moines, in the State of Iowa, on the 12th day of May, A. D. 1873:

Present, Hon. Jas. M. Love, presiding judge.

On the 23d day of May, A. D. 1873, it being the eleventh day of said term of said court, the above-entitled cause came on for hearing before Hon. Jas. M. Love, presiding judge. A jury was duly empanneled and sworn and the trial was continued to the jury through the 24th day of May, A. D. 1873. The plaintiffs alleged that the injuries complained of were occasioned by the gross neglect and carelessness of the defendants by its servants and agents.

50 There was evidence offered that plaintiff, Mary A. F. Arms, was, at the time of the alleged injuries, a passenger on the de-

fendant's train of cars; that the train on which she was riding collided with an engine on defendant's track. There was testimony that the train on which said plaintiff was riding was moving at the rate of fourteen or fifteen miles an hour, and the same witness stated that the jar occasioned by the collision was light, and was more of a push than a shock. It was also testified by the said plaintiff that the fronts of the two engines were demolished and that a new engine removed the train. There was evidence offered, also, further showing the result of the collision as to throwing plaintiff from her seat and tending to show the injuries set out and alleged in the plaintiffs' petition.

Which was all the testimony offered be either party as to the character of the collision & its cause (but not all as to its effect or results to pl't'ff.)

51 And after the evidence had all been submitted to the jury, there being no testimony to prove that the defendant corporation had approved or ratified the carelessness of its employees, the court instructed the jury, among other things, as follows:

"If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or exemplary damages."

To the giving of which particular instruction of the court to the jury, the defendant by its counsel at the time excepted and objected.

And at the same time the court instructed the jury as follows:

"The form of the verdict, if for the plaintiff, will be as follows:

"We, the jury, find for the plaintiff Mary A. F. Arms, under the first count of the amended petition, marked 'A,' and fix the damages at $

"We, the jury, further find for the plaintiff D. D. Arms, under the amended petition, marked 'A,' and fix the damages at "

52 To the giving of which instruction of the court to the jury, the defendant, by its counsel, at the time objected and excepted, but not to the direction of the court in regard to the form of the verdict.

And afterwards, to wit, on the same day, the said jury retired, and, after deliberation, on the same day returned into court the following verdict:

"We, the jury, find for the plaintiff Mary A. F. Arms, under the first count of the amended petition, marked 'A,' and fix the damages at four thousand dollars ($4,000.)

"We, the jury, further find for the plaintiff D. D. Arms, under the amended petition, marked 'A,' and fix the damages at ($100) one hundred dollars.

"M. G. TULLIS, *Foreman.*"

And afterwards, to wit, on the 4th day of June, 1873, it being the twenty-first day of said term of said court, the defendant aforesaid filed in said court a motion for a new trial of said cause, which motion

53 is hereto annexed marked "Exhibit A," and made a part hereof.

And afterwards, to wit, on the 5th day of June, A. D. 1873, said motion coming on for hearing, the court overruled and refused said motion, to which ruling of the court, refusing said motion and overruling the same, the defendant, by its counsel, at the time objected and excepted.

And afterwards, to wit, on the 5th day of June, A. D. 1873, it being the 22nd day of said term, the said defendant filed in said court a motion in arrest of judgment, and for a repleader, which motion is hereto annexed marked "Exhibit B," and made a part hereof.

And afterwards, on the said 5th day of June, A. D. 1873, the said

motion coming on for hearing, the court refused and overruled said motion and entered judgment for the plaintiffs on said verdict; to which ruling of the court, overruling and refusing said motion and entering judgment for plaintiffs on said verdict, the defendant by its counsel at the time objected and excepted.

54 Wherefore defendants prays that this, its bill of exceptions, be made, allowed, and declared a part of the record in this cause, which is accordingly done, in open court, this 5th day of June, 1873. Witness the hand of said Hon. Jas. M. Love, and the seal.

J. M. LOVE, *Judge.*

(Endorsed:) Filed in open court this 5th day of June, A. D. 1873. George B. Corkhill, clerk.

55 On the same day, to wit, June 5th, 1873, there was filed by said defendants, in said clerk's office, a writ of error in said cause, which writ of error is in words and figures following, to wit:

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court before you, between Mary A. F. Arms & D. D. Arms and The Milwaukee & Saint Paul Railway Company, a manifest error hath happened, to the great damage of the said Milwaukee & St. Paul Railway Co., as by *his* complaint appears; and we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on second Monday in October next, in the Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, sr. associate justice of the said Supreme Court of the United States, this 5th day of June, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Circuit Court, Dist. of Iowa.

Allowed:

J. M. LOVE, *Judge.*

(Endorsed:) Filed June 5, 1873. George B. Corkhill, clerk.

57 On the same day, to wit, June 5, 1873, there was filed in said clerk's office the following citation, to wit:

58 UNITED STATES OF AMERICA, *ss:*

To Mary A. F. Arms and D. D. Arms, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden on the second Monday

in October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein The Milwaukee & St. Paul Railway Company is plaintiff and Mary A. F. Arms and D. D. Arms are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable James M. Love, one of the judges of the said circuit court of the United States, this 5th day of June, in the year of our Lord 1873.

[SEAL.] J. M. LOVE, *Judge.*

Service of the within hereby accepted on this 19th day of Aug., 1873, at Des Moines, Iowa.

NOURSE, KAUFFMAN & HOLM,
Attys. for Plffs., Mary A. F. & D. D. Arms.

(Indorsed: Filed June 5, 1873. George B. Corkhill, clerk.

59 And afterwards, to wit, on the 19th day of July, A. D. 1873, said defendant filed its supersedeas bond in said clerk's office; which said supersedeas bond is in words and figures following, to wit:

60 Know all men by these presents that we, The Milwaukee and Saint Paul Railway Company, as principal, and Jas. T. Bassett and Wm. Flemming as sureties, are held and firmly bound unto Mary A. F. Arms and D. D. Arms in the full and just sum of eight thousand five hundred dollars, to be paid to the said Mary A. F. Arms and D. D. Arms, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately, at a term of the circuit court of the United States for the district of Iowa, begun and held in said district, at Des Moines, on the 12th day of May, A. D. 1873, in a suit depending in said court between Mary A. F. Arms and D. D. Arms, as plaintiffs, and The Milwaukee and Saint Paul Railway Company, as defendants,

61 judgment was, on the fifth day of June, in the year aforesaid, rendered against the said Milwaukee and Saint Paul Railway Company, on a verdict awarding to the said Mary A. F. Arms four thousand dollars, and to the said D. D. Arms one hundred dollars, the judgment being for the full amount thus awarded, and the said Milwaukee and Saint Paul Railway Company having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse, in the Supreme Court of the United States, the judgment rendered in the aforesaid suit as aforesaid, and a citation directed to the said Mary A. F. Arms and D. D. Arms, citing and admonishing them to be at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Milwaukee and Saint Paul Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall

62 fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MILWAUKEE AND
SAINT PAUL RAILWAY COMPANY, [L. S.]
By THOS. UPDEGRAFF, *its Atty.*
JAS. F. BASSETT. [L. S.]
WM. FLEMMING. [L. S.]

Signed, sealed, and delivered in the presence of—
M. E. DUFF.
EDMUND DOUGLAS.

Jas. F. Bassett and Wm. Flemming, each for himself, do solemnly swear that we are residents and freeholders of the State of Iowa, and own and possess, each of us, property in the State of Iowa worth double the amount of the penalty of the foregoing bond, over and above all debts, dues, liabilities, and exemptions.

JAS. F. BASSETT.
WM. FLEMMING.

Sworn to and subscribed before me, this 17th day of July, 1873.
Subscribed and sworn to before me this 17th day of July, A. D. 1873.

A. J. JORDAN,
United States Commissioner for the District of Iowa.

63 Acknowledged before me, at McGregor, Iowa, this 17th day of July, 1873. And I further certify that I am personally acquainted with each of the said sureties, and I believe them to be responsible for amount of said *court.*

A. J. JORDAN,
United States Commissioner for the District of Iowa.

(Endorsed:) Approved and filed July 19, 1873. George B. Corkhill, clerk

64 Circuit court of the United States, district of Iowa.

I, George B. Corkhill, clerk of said court, for said district, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of transcript from circuit court of Howard County, Iowa, amended petition of plffs., deft.'s answer thereto, record entries, motion for new trial, assignment of error, bill of exceptions, writ of error and supersedeas bond, in a certain cause, wherein Mary A. F. & D. D. Arms, are plaintiff', and The Milwaukee and St. Paul Railway Company defendant.

I further certify that said transcript contains the original citation issued in said cause, a copy of which is now on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in Des Moines, in said district, this 19th day of August, A. D. 1873.

[SEAL.]

GEORGE B. CORKHILL,
Clerk C. C. U. S., Dist. of Iowa.

(Indorsement on cover:) No. 331. The Milwaukee and Saint Paul Railway Company, plaintiff in error, vs. Mary A. F. Arms & D. D. Arms. Iowa C. C. U. S. Filed 10th November, 1873.

REC. 331—2

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1875—NO. 105.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Plaintiff in Error,*

vs.

MARY A. F. ARMS AND D D. ARMS, *Defendants in Error.*

BRIEF AND ARGUMENT FOR APPELLANT.

JOHN W. CARY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875—NO. 105.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,

vs.

MARY A. F. ARMS AND D D. ARMS,
Defendant's in Error.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

This action was to recover for a personal injury alleged to have been received by Mary A. F. Arms, in October, 1870, while a passenger on the cars of the plaintiff in error. The action was commenced in the Circuit Court of Howard County, Iowa, in February, 1871 (Record, p. 1). On the 2d day of November, 1871, the said Milwaukee and St. Paul Railway Company filed its petition to remove said cause into the Circuit Court of the United States for the District of Iowa, stating that said Mary A. F. Arms was a citizen of the State

of Iowa; that said petitioner, the Milwaukee and St. Paul Railway Company, was a citizen of the State of Wisconsin, but contained no statement of the citizenship of said plaintiff D. D. Arms (Record, p. 3). The requisite bond was filed, and the said action was on the same day removed from the said Circuit Court of Howard County, Iowa, into the Circuit Court of the United States (Record, pp. 4 and 5). On the 14th day of May, 1872, the defendants in error, filed in said Circuit Court of the United States an amended petition (declaration), setting forth that, on the 12th day of November, 1870, the plaintiff was a corporation and common carrier, and engaged in operating a railroad and carrying passengers and freight from McGregor to Cresco, in the State of Iowa; that on that day the plaintiff, Mary A. F. Arms, being then and there the wife of D. D. Arms, the other plaintiff herein, purchased a ticket on defendant's railroad at said town of McGregor, to be thereon conveyed to said town of Cresco, and that defendants then and there undertook to convey the said Mary A. F. Arms from McGregor to Cresco. That while transporting her as such passenger aforesaid, the defendant was guilty of gross carelessness and negligence in the premises, "and caused and permitted the train, upon which said Mary A. F. Arms was a passenger as aforesaid, and one engine and tender upon the same road, coming in an opposite direction, and under the control of the servants and agents of defendants, to collide with each other, whereby, and without any fault of plaintiff, the said Mary A. F. Arms was thrown from the seat with great

violence, and was thrown upon and against the stove in said cars, and her hands and arms were severely burned, and her spine and right hip severely and permanently injured, and she was caused to miscarry and have a premature childbirth;" that by reason thereof she was confined to her bed and room, and suffered great bodily pains and mental anguish; that she had previously been able to earn large sums of money in teaching, and was able to provide for herself and family and her children, but since then she has been wholly disabled from performing any work or labor or from teaching, and that said injuries are permanent, and plaintiffs have paid out large sums of money for medical attendance, etc. "Wherefore plaintiffs have been damaged, to-wit, in the sum of $8,000."

The second count was in the words and figures following:

"*Second Count.*—And the said D. D. Arms, in his own "right, shows and avers, for a further and additional "cause of action against the said defendant, that he is "the husband of the said Mary A. F. Arms, and was "her husband at and prior to the 12th day of October, "1870, and since that time, that by reason of the fault "and negligence of defendant and the failure of defend-"ant to perform the said undertaking to safely convey "his said wife, as set out in the first count of this peti-"tion, to-wit, in the sum of $2,000.

"Wherefore plaintiffs ask judgment upon the several "causes of action, as aforesaid, to-wit, in the aggregate "sum of $10,000 and costs of suit."—(Record, p. p. 6 and 7.) The answer of defendant was a general denial.

(Record p. 8.)

This cause afterwards came on for trial; "plaintiffs, be- "fore trial, had leave to strike out the name of D. D. Arms "as co-plaintiff as to the first count of the petition, and "the cause to proceed accordingly." There is no record that it was done. (Record, p. 11.) A jury was then sworn to try the issues in this case, and after hearing the testimony, returned their verdict as follows:

"We, the jury, find for the plaintiff, Mary A. F. "Arms, under the first count of the amended petition, "marked "A," and fix the damages at $4,000.

M. G. TULLIS, Foreman."

"And we, the jury, further find for the plaintiff, D. "D. Arms, under the amended petition, marked "A," "and fix the damages at $100.

M. G. TULLIS, Foreman."

(Record, p. 11.)

The plaintiff in error filed a motion for a new trial, which was overruled and judgment was entered in the words and figures following:

"Thereupon it is ordered that plaintiffs have judg- "ment upon the verdict of the jury heretofore rendered "herein. It is therefore considered and adjudged that "plaintiff, Mary A. F. Arms, have and recover of and "from defendants, the Milwaukee and St. Paul Railway "Company, the sum of $4,000, with interest and cost of "suit taxed at $, and that execution issue there- "for. It is further ordered and adjudged that plaintiff "D. D. Arms have and recover of and from said defend- "ant the sum of $100, with interest and cost of suit

"taxed at $, and that execution issue therefor."
(Record, p. 12.)

On the same day a bill of exceptions was settled and signed by the said district judge and filed with the clerk from which it appears, that said district judge, after the testimony had been heard by said jury, did charge said jury as follows:

"If you find that the accident was caused by the "gross negligence of the defendant's servants controlling "the train, you may give to the plaintiffs punitive or "exemplary damages," to which the counsel for the plaintiff in error then and there excepted.

The said district judge further instructed said jury as follows: "The form of the verdict, if for the plaintiff, "will be as follows: We, the jury, find for the plaintiff "Mary A. F. Arms, under the first count of the amend-"ed petition, marked "A," and fix the damages at $ "We, the jury, further find for the plaintiff D. D. Arms, "under the amended petition, marked "A," and fix the "damages at $," to which instruction the counsel for plaintiff in error then and there excepted.

The said counsel for said plaintiff in error then moved in arrest of judgment and for a repleader which was overruled, and the counsel for plaintiff in error then and there excepted.

ASSIGNMENT OF ERRORS.

1*st*. The Court below had no jurisdiction of the action for the reason that the petition for removal did not state, that the plaintiff, D. D. Arms, was a citizen of the

State of Iowa, and contained no statement in reference to his citizenship.

2*d*. The two causes of action attempted to be set out in the amended complaint could not be joined in one action by the husband and wife as joint plaintiffs. Nor was it competent for the Court below, or in accordance with any known rules of practice in an action at common law, to strike the name of one plaintiff from one of the counts of the declaration, and then continue the trial of the whole suit jointly as to the rest of the action, but separately as to this one count, and all in one action or proceeding, and before one jury.

3*d*. The court below erred in directing the jury to return two separate amounts as their verdict in one joint action by husband and wife, and for the same matter. —one in the name of the wife, and the other in the name of the husband, one of said amounts being based wholly upon one count of the petition, and the other on the whole petition, including both counts, upon which fragments of a verdict two distinct judgments with costs are entered against the defendant. This proceeding was a variance from the original writ.

4*th*. The court should have granted the motion in arrest of judgment and for a repleader.

5*th*. The court erred in charging the jury as follows: "If you find that the accident was caused by the gross "negligence of the defendant's servants, controlling the "train, you may give to the plaintiffs punitive or ex- "emplary damages."

I.

The court below had no jurisdiction of the action for the reason that the petition for removal did not state that the plaintiff, D. D. Arms, was a citizen of the State of Iowa, and contained no statement in reference to his citizenship.

The party plaintiffs in the State court and in the court below, were D. D. Arms and Mary A. F. Arms. The statute under which it was attempted to remove this cause provides, that where a citizen of another State is sued in the courts of a State, of which the party plaintiff is a citizen, such defendant may remove the cause into the Circuit Court of the United States for the district where such suit is pending. The petition in this case states that one of the two persons plaintiff is a citizen of the State of Iowa, but says nothing whatever as to the other plaintiff. It does not appear of what State he was a citizen, and without such statement the State court should not have removed the cause, nor should the Circuit Court of the United States have taken jurisdiction thereof. But the State Court did act upon the petition, and the Circuit Court of the United States assumed to take jurisdiction of the case, and the question now arises, whether jurisdiction did actually attach so as to authorize that court to render a valid judgment. I do not propose to argue the question, but suggest it *amicus curiae*, rather than as counsel for the plaintiff in error.

Case et al., vs. Douglas et al., 1 Dillon, 299, and cases there cited.

Coal Company vs Blatchford, 11 Wallace, 172.

II.

The two causes of action, attempted to be set out in the amended complaint could not be joined in one action by the husband and wife, as joint plaintiffs: was it competent for the court below, or in accordance with any known rules of practice in an action at common law, to strike the name of one of two joint plaintiffs from one of the counts of the declaration, and then continue the trial of the whole suit, jointly as to the rest of the action, but separately as to this one count, and all in one action or proceeding, and before one jury?

The courts of the United States are governed by certain well known rules and laws, which all suitors are bound to know and conform to, and their practice is regulated in accordance with the rules of common law, except so far as it has been changed or modified by statute and the rules of court. But the proceedings adopted in this case, assuming that the plaintiffs acted upon the leave granted, are such an entire departure from all rule and practice, that I am at a loss what to say or how to object to it in any known legal phrase. It appears to have been an entire departure from all ordinary proceedings in courts of common law. There was but one suit in the commencement, by two joint plaintiffs, against the defendant; there was but one petition

of these joint plaintiffs against this defendant; but one answer was made to this petition or declaration. But on the trial one of the joint plaintiffs is in name removed from a certain part of this one joint declaration, and the suit proceeds to trial, both plaintiffs still parties to the whole, but one of them claiming a special interest in a part. There is but one trial, and at its close the court directs that the jury shall find for the wife specially as to a part, and for the husband as to the whole of the declaration, and no verdict for them jointly, as they brought the suit and as it was prosecuted to the end, except as to the first count. It is respectfully submitted, that this whole proceeding is irregular; that it should be set aside and vacated, and that these parties should try their cause and have it adjudged in accordance with the known usages and practice of the court. If two suits are necessary, let two be commenced and prosecuted. It was error to divide this one in the manner in which it was divided.

III.

The court below erred in directing the jury to return two separate amounts as their verdict in one joint action by husband and wife, and for the same matter, one in the name of the wife, and the other in the name of the husband, one of said amounts being based wholly upon one count of the petition, and the other on the whole petition, including both counts, upon which fragments of

a verdict two distinct judgments with costs have been entered against the defendant.

I submit that this instruction to the jury was erroneous, and that there can be but one verdict and one judgment in any one case at law, and that the judgments entered in this case are a variance from the original writ, and therefore erroneous.

IV.

The Court should have granted the motion in arrest of judgment and for a repleader.

The judgment should have been arrested on the second count, for the reason that it states no cause of action against the defendant, and the whole proceeding was irregular and should have been arrested.

V.

The District Judge erred in charging the jury as follows: "*If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or exemplary damages.*"

The giving of this instruction was erroneous

1*st*, Because there was no testimony which would warrant the Judge in submitting the question of gross negligence to the jury for any purpose.

The bill of exceptions states (at pages 13 and 14) that: "There was evidence offered that plaintiff, Mary "A. F. Arms, was, at the time of the alleged injuries, a

"passenger on defendant's train of cars; that the train "on which she was riding collided with an engine on "defendant's track. There was testimony that the train "on which said plaintiff was riding, was moving at the "rate of fourteen or fifteen miles an hour, and the same "witness stated, that the jar occasioned by the collision "was light, and was more a push than a shock. It was "also testified by the said plaintiff, that the fronts of "the two engines were demolished, and that a new en-"gine removed the train. There was evidence offered "also, further showing the result of the collision as to "throwing plaintiff from her seat, and tending to show "the injuries set out and alleged in the plaintiff's "petition, which was all the testimony by either party, "as to the character of the collision, and its cause (but "not all as to its effects or results to plaintiff)."

There was no proof that defendant knew of, authorized, ratified or approved of the acts that produced this collision, or any negligence of its servants in charge of the train.

Unless the fact that two railroad trains collide, is, *ipso facto*, evidence from which a jury are to infer gross negligence. There was certainly no evidence in this case that would authorize the judge to submit that question to the consideration of the jury, as to defendant's servants, much less as to defendant. The train on which the plaintiff was riding was moving at a very moderate rate of speed, and, from the description of the collision, and its effects, the colliding locomotive must have been nearly or quite stationary. "The collision was more of

a push than a shock," and its only effect was to demolish the fronts of the two locomotives. It does not appear that either train was thrown from the track, but a new engine went on with the train. If a collision was to occur, it could not well happen under more favorable circumstances, or create less injury. There was nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the company. While, therefore, I admit that some degree of negligence must be imputed to the Company's servants on this account, it is not evidence of gross negligence without other facts and circumstances as to them, and no evidence as to the negligence of the company. The Judge was not justified in submitting the question of gross negligence to the jury.

2*d*. There is no well-considered case that holds that mere negligence is a ground for awarding punitory damages against any one. Negligence may be slight, ordinrry or gross; still, if it is mere negligence, unmixed with gross fraud, malice, willfulness, wanton recklessness or oppression, punitory damages cannot be allowed. Willful negligence will warrant exemplary damages against the persons guilty of it, but in such a case it is necessary to show by proof that the negligence was willful, in other words, intentional. There was in this case no proof of the kind. There was nothing to show that it was not one of those neglects which might occur on a large road in the employment of many men, and doing a large business, without gross fault in the management of the Company. In fact, it was assumed by the Judge

that it was only neglect of the defendant's servants in charge of the train, and not the neglect of the Company. Therefore, exemplary damages should not have been allowed against the company in any event.

3*d*. The charge was, "if you find that the accident was caused by the gross negligence of the *defendant's servants controlling the train*, you may give to the plaintiff punitive or exemplary damages." This is the only case, so far as I am aware, where the court has ever charged that if the servants were negligent, punitive damages might be awarded against the master. The charge is generally, that if the defendant is guilty of negligence. There is no pretense here of any negligence except the negligence of the servants in charge of the train. Admitting that said servants were guilty of negligence, still the plaintiffs in this action would not be entitled to punitory damages without proof that defendant had approved, ratified or participated in said carelessness. There is no pretense of any such proof. The bill of exceptions says there was not. The form of the instruction raises the simple legal proposition, Does the negligence of the defendant's servants, without defendant's knowledge or fault, authorize the jury to give punitive or exemplary damages against the defendant?

This question was passed upon by Justice Story, in this court, in the case of the "Amiable Nancy," (3 Wheaton, 346). The suit was against the owners of the privateer, and not against their servants who committed the wrong, and he says: "And if this was a suit against "the original wrongdoers, it might be proper to go fur-

"ther and visit upon them in the shape of exemplary "damages the proper punishment which belongs to such "lawless misconduct."

In *Philadelphia & Reading R. R. Company vs. Derby* (14 Howard, 468), which was a case of negligence on the part of the employes of the company, which was characterized as gross, yet punitive damages were not allowed.

In the case of Philadelphia, Wilmington and Baltimore Railroad Company vs. Quigley (21 Howard, 202–213), the court limits and defines the cases in which exemplary damages are allowed.

In *Finney vs. Milwaukee & Mississippi R. R. Co.* (10 Wisconsin, 388), the court settled the doctrine for that State—that punitive damages could not be allowed for the acts of the employes, not directed, ratified or approved by the company. That was the case of the wrongful expulsion of a passenger from the cars.

The same doctrine has recently been affirmed in that State in Craker vs. Chicago and Northwestern Railway Company (36 Wisconsin, 657).

This question was before the Court of Appeals in New York, in the case of *Cleghorn vs. the New York Central and Hudson River Railroad Company* (56 N. Y., 44). Chief Justice Church, in giving the opinion of the Court, says: "For injuries by the negligence of the "servant while engaged in the business of the master, "within the scope of his employment, the latter is "liable for compensatory damages, but for negligence, "however gross or culpable, he is not liable to be pun-

"isqed in punitive damages unless he is also chargeable "with gross misconduct. Such misconduct may be estab- "lished by showing that the act of the servant was "authorized or ratified. or that the master employed or "retained the servant, knowing that he was incompetent, "or, from bad habits, unfit for the position he occupied. "Something more than ordinary negligence is requisite; "it must be reckless and of a criminal nature, and clearly "established. Corporations may incur this liability as "well as private persons." See also Hamilton vs. the Third Avenue R. R. Co., 53 N. ., 25; Weed vs. Railroad, 17 New York, 362.

The case of *Hagan vs. Providence & Wooster Railroad Company*, 3 Rhode Island 88, was a case were the plaintiff had been wrongfully expelled from the cars after surrendering his ticket, vindictive damages were claimed, which claim was overruled at the Circuit Court, and the plaintiff appealed. The Supreme Court say: "We un- "derstand, however, that the evidence in the case was not "such as to show any participation of the principal in "the wrongful act of the agent, and that the jury were "instructed that punitive or vindictive damages, or smart "money, were not to be allowed as against the principal, "unless the principal participated in the wrongful act of "the agent, expressly or impliedly, by his conduct, author- "izing it or approving it, either before or after it was "committed. * * * We think the charge was "right. In cases where punitive or exemplary damages "have been assessed, it has been done upon evidence of "such wilfulness, recklessness or wickedness, on the part

"of the party at fault, as amounted to criminality, which "for the good of society and warning to the individual, "ought to be punished. We do not see how such dam- "ages can be allowed, where the principal is prosecuted "for the tortious act of his servant, unless there is proof "in the cause to implicate the principal and make him "*particeps criminis* of his agent's act. No man should "be punished for that of which he is not guilty."

In *Ackerson vs. Erie Railway Company.* 32 New Jersey, 254. A switch was left opened in consequence of which the passenger train was thrown from the track down a bank, and the plaintiff injured so that he lost his arm. The court says: "The ruling of the Judge, at the "trial, was that the case was not one that authorized a "verdict for more damages than were actually sustained. "I am satisfied that this ruling was correct, inasmuch as "there was no attempt to prove any neglect of the com- "pany as contradistinguished from its subordinate agents. "In fact, the only fault or negligence complained of was "that of the employe of the company. Where a rail- "road company adopts all rules and regulations needful "for the safety of the passengers, and employes, compe- "tent agents, whose duty it is to see that these rules and "regulations are observed, I do not think that the com- "pany, in case of injury to passengers, happening by "reason of the failure of the agent to perform his duty, "can be held liable for punitive damages. If, however, "the company, as such, is in fault, a different rule ap- "plies. The company for its own carelessness, may be "justly held liable for smart money. This rule does not

"prevail when the carelessness is only that of a sub-
"ordinate agent. * * * I cannot yield to the
"argument, so earnestly urged by the counsel of the
"plaintiff, that by construction of law, the company is
"guilty of gross negligence whenever its agent is, and is,
"therefore, to be treated the same as if through its own
"gross negligence the injury happened."

In *New Orleans, Jackson and Great Northern Railroad Company vs. Stathan*, 42 Miss., 607. The court say that to warrant a jury in finding a verdict for exemplary or punitive damages, either malice, violence, fraud or oppression, must be shown to have mingled in the acts complained of and directly disapproves of the case of *same company vs. Hurst*, 36 Miss Although the court in that case in giving its reasons for not disturbing the verdict says that "violence and insult and oppression" were shown to Hurst by the conductor of the company, and that the acts of the conductor were ratified and approved by the company before the suit, and that the company fully sustained him in his tortious acts, which if true, made the acts of the conductor the acts of the company, and for that reason is not authority that punitive damages may be visited upon the company for the act of an agent or employe.

The case of *Turner vs. North Beach and Mission Railroad Company* (34 California, 594), was where the conductor of a street car ejected a colored woman from platform of car. The Circuit Judge, among other things, charged the jury that the "injury, if committed, and if "a willful one on the part of the defendant, in their

"servant, the conductor, and accompanied by malice or "such acts as in their nature tended to show a purpose "of resentment or ill will, or a disposition to degrade "the plaintiff, entitled her to what is called exemplary "damages; also that where a duty imposed by law is "willfully and malevolently refused to be performed, or "performed in such a way as to wound the feelings "of the person to whom it is owing, the injury partakes "more or less of a public character, and extends beyond "the mere pecuniary damage sustained by the party "against whom it was committed."

The Supreme Court say: "There was no proof what-"ever in the case tending to show malice or willful in-"jury on the part of the defendant, the railroad com-"pany. If any malice, ill will or wanton conduct was "exhibited by any one it was by the conductor, and there "was no proof tending to show that the railroad com-pany either prompted or was privy to it in advance, "or approved it afterwards." The court therefore held the Company was not liable to punitive damages, and that to render it so liable it was necessary for the plaintiff to show that the act complained of was done with the authority, express or implied, of the defendant, or was subsequently adopted by the company.

The case of Wardrobe vs. the California Stage Company (7 California, 118), holds the same doctrine, and further holds that the case is one of simple *negligence*, in which the elements of fraud, malice or oppression, do not enter, and for that reason not a case for punitive damages. The jury in that case, by their verdict, found

for actual and exemplary damages, $2,500, which was reversed.

The case of Moody and wife (4 California, 297), holds that in case of simple negligence the rule is to recover only actual damages. Smart money in such cases is not allowed.

The rule as laid down by the Supreme Court of Minnesota, in Du Laurans vs. First Division of St. Paul and Pacific (15 Minnesota, 49), is that only compensatory damages can be recovered for a wrongful expulsion from the cars.

The Supreme Court of Michigan in the cases of Detroit Daily Post Company vs. Donald McArthur, and Daily Free Press Company vs. same (16 Mich., 447), hold that the employer, the publisher of a paper, is not liable in exemplary damages for the express malice of his subordinates where he is in no fault himself. The same doctrine was re-affirmed in the case of the *Great Western Railway Co. vs. Miller* (19 Michigan, 305–315.)

In Ohio, the cases of the Pittsburgh, Fort Wayne and Chicago Railroad Company vs. Shener (19 Ohio, State 157), and the Atlantic and Great Western Railroad Company vs. Dunn (19 Ohio, State 162), are decided by three judges, against two in favor of allowing punitive damages, in a proper case against the Company for the malice of the employe. At page 590 of same volume is found the dissenting opinion of the minority.

In the case of *Pennsylvania Co. vs. Kelly*, 31 Pa., 372, the court, Judge Woodard, says where there has been no oppression, fraud, wantoness, or other circumstances to

call for exemplary damages, these large verdicts are a violation of the rule of compensation. And a violation that is just as unpardonable, when practiced against a corporation, as against an individual. The judgment was reversed. The particular question here involved was not in issue and was not discussed.

In *Heil vs. Gendening*, 42 Pa., 493, was a case of injury from negligence, and Mr. Justice Strong in giving the opinion of the court, say: "Compensation was all that the plaintiff could, under any circumstances of this case, claim. The injury, not having been willful, there was no room for vindictive damages."

In *Hill vs. The New Orleans and Opelousas and Great Western Railroad Company*, 11 Louisiana, Annual 292, which was a case where gross negligence was charged, the court say: "In actions of this kind it is not within the province of the jury, although the negligence is clearly proven, to give vindictive damages, as is sometimes allowed in cases of willful and malicious injuries. * * * The company in such a case is not to be punished for the negligence and carelessness of its agents as a crime."

If an injury to the person be committed unintentionally, and result simply from negligence or want of care, the damages awarded should be compensatory; if it be *willful and intentional*, exemplary damages may be allowed.

Juries may give exemplary damages in case of willful negligence or malice; but to constitute willful negligence, the act done or omitted must be the result of intention —mere neglect cannot be regarded as willfulness. *The Peoria Bridge Association vs. Loomis* (20 Illinois, 235).

In order to authorize exemplary damages in case of willful negligence, it is necessary such a case should be made by the proof. In the absence of intention to do the injury, they cannot be allowed. The Chicago and Rock Island Railroad Company vs. McKean 40 Ill., 218).

The case of *Louisville and Portland Railroad Company vs. Smith* (2 Duvall, 556), was a case of negligence on the part of the driver of the car, by which Smith lost his arm. The Circuit Judge instructed the jury that they might in their discretion allow exemplary damages; for which ruling the jndgment was reversed.

In the case of Kentucky Central Railroad Company vs. Dills (4 Bush, 593), the court say, if the damage resulted to the passenger solely from the negligence of the railroad company's agents, it is liable to compensatory damage only.

The doctrine contended for by the defendant in error, and which was adopted in the court below in this case, has been adopted by some of the State courts. The leading case on that side of the question is that of Goddard vs. The Grand Trunk Railroad Company, 57 Maine, 202. "The Judge at the circuit in that case refused to instruct "the jury that if the acts and words of the defendant's "servant were not directly nor impliedly authorized nor "ratified by the defendant, the plaintiff could not recover "exemplary damages," and this ruling was sustained in the Supreme Court, and the opinion seems to hold that a different rule should be applied to railroad corporations than that applicable to natural persons or other corporations even. Similar decisions have been made in the State

of New Hampshire and in Mississippi. These decisions all appear to proceed upon the basis that the subordinate agents or employes of a railroad are the company, and that their acts are to be taken as the acts of the company, making no distinction between them and the general officers and responsible controlling agents of the company, and that their carelessness or malice is the malice of the company. In the reasoning of these cases, there is no such relation as employer and employe, or master and servant, where a railroad company is concerned, and this relation, with its duties and consequences, is ignored. This view of the case is wholly in conflict with the authorities I have cited.

Mr. Justice Grover, in the case of *Hamilton* vs. Railroad company (53 N. Y., 29), referring to this matter, says: "It is obvious that no distinction can be made in respect "to this liability, whether the master be a natural or ar- "tificial person."

Punitive or exemplary damages are never given except as a punishment for an offense of which the defendant has been guilty. But the rule here applied, in the Court below, proposes to inflict such punishment upon the innocent--upon the master for the act of the servant. It is for this Court to determine whether such a change in the rule shall be made.

JOHN W. CARY,

Of Counsel for Plaintiff in Error.

BRIEF OF DEFENDANT IN ERROR.

UNITED STATES SUPREME COURT.

No. 331.

THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

MARY A. F. ARMES AND D. D. ARMES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Plaintiff in Error,*	
vs.	No. 331.
MARY A. F. ARMES AND D. D. ARMES, *Defendants in Error.*	

BRIEF OF DEFENDANT IN ERROR.

We have not been favored as yet with the brief of the plaintiff in error, but presumed we are advised, by the assignment of errors on page 13 of the record, of the points designed to be presented by this appeal.

This is an action by Mary A. F. Armes and D. D. Armes, being husband and wife, against the plaintiff in error for damages suffered by them by reason of the serious injury of Mrs. Armes, while a passenger on board of one of the trains of plaintiff in error, by reason of a collision of the train, upon which she was a passenger, with another train or engine upon the same track moving in an opposite direction.

The Court on the trial of the cause before the jury, among other instructions, gave the following :

"If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." (*Record, p. 14.*)

To the giving of this instruction plaintiff in error excepted, and we understand that the principal question to be urged in this Court is as to the correctness of this instruction. The petition charges upon plaintiff in error, the railroad company, the guilt of gross negligence and carelessness in suffering the trains to collide. The bill of exceptions, (pp. 13 and 14 of record,) shows that the evidence was, that at the time of the alleged injuries Mrs. Armes was a passenger on the defendant's train of cars, and that the train on which she was riding collided with another train on defendant's track. It further appears by the bill of exceptions that the railroad company offered no evidence whatever to explain the cause of the collision. It is not to be presumed that the cause of this collision was known to the plaintiff herself, but that it was known to the railroad company cannot, of course, be doubted, and the absence of any testimony tending to excuse or palliate it afforded to the jury the strongest possible presumption that no excuse or palliating circumstances existed. We have therefore a case not simply of collision, which is of itself *prima facie* evidence of gross negligence, but we have the railroad company standing dumb in the face of an accusation and charge of gross carelessness and negligence, and offering no word of explanation or excuse for the calamity. The jury therefore were fully warranted in finding negligence of the grossest character. It therefore remains to be considered simply whether in any case of gross carelessness unaccompained with any pretense of palliating circumstances or excuse, a railroad company would be liable for exemplary or punitive damages.

It is to be observed also that *gross negligence*, where the highest decree of care is required, should be, and from motives of public policy is in fact, regarded as criminal, and many instances are found in the elementary works on criminal law where gross negligence is punished as a crime.

Wharton's American Criminal Law, § 1002, *et seq.*

In no class of cases is this doctrine more salutary than in its application to railway companies.

Recognizing this fact the legislatures of many of the States have prescribed severe punishment for negligence in the management of trains upon railways.

This Court in the case of *Philadelphia & Reading R. R. Co. vs. Derby*, 14 Howard, 468, uses the following language :

> When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. *Any negligence in such cases may well deserve the epithet of "gross."*

If in view of the high degree of care required of railroad companies and the demands of public policy, any negligence is deserving of the epithet of "gross," what shall be said of actual gross negligence or the utter absence of the slightest care or regard for human life and safety?

We have made, we think, a careful examination of the authorities bearing upon this question, and think the question may be regarded as well settled.

" Gross negligence," as used in this connection, has acquired a meaning in the law akin to wantonness. In general it is defined to mean the absence of *slight* diligence. Bouvier Tit., "negligence." It is utter recklessness. Gross negligence of a railway company in the management of its *passenger* trains is nothing less than an utter disregard of human life. It is wantonness, and public policy, as we have before said requires that it should be so considered, as will be fully seen by the authorities we will hereafter cite.

The case of *Whipple vs. Walpole*, 10 N. H., 130, is to the point that exemplary damages may be allowed by the jury in case of gross negligence, and the same point has been fully settled in that State in actions against railway corporations.

The case of *Hopkins vs. The Atlantic & St. Lawrence R. R. Co.*, 36 N. H., 9, is precisely in point both in its facts and conclusions, and we give a brief extract from the opinion of the Court. (See pages 18 and 19.)

If a serious personal injury happens to a passenger, by gross negligence in the management of a railroad train, it is difficult to suggest a case where the public interest would more loudly call for an exemplary verdict. It is a subject in which all the travelling public are deeply interested, for railroads have now a practical monopoly for transporting passengers on all the principal lines of travel; and the disasters which have happened in that mode of traveling have been so great and numerous, that gross carelessness in the management of railroad trains ought not to be encouraged by any lax administration of the law in such cases.

And gross carelessness in such a case implies a heedless disregard for human life, and for the safety of passengers who intrust themselves to the care of the road; which brings the case very strongly within the rule that the wrong complained of, to warrant exemplary damages, must have something of a criminal character. Gross carelessness, where duty to the public requires the utmost care—and even that is not always sufficient to prevent the most serious calamities—has certainly a strong character of cruelty and moral turpitude. All the general reasons which have been assigned for allowing exemplary damages appear to apply in full force to this case, and we think the instructions of the Court on *that* point were correct.

This doctrine was again reaffirmed by same Court on mature consideration in *Taylor vs. Railway Co.*, 48 N. H., 304-318.

The case of *Goddard vs. The Grand Trunk R. R. Company*, 57 Maine, 202, is also a well considered case, and in point as to exemplary damages against railroad corporations. This case is also reported in American Law Register, vol. 10, p. 17, where many authorities are cited, and to which Judge Redfield adds a valuable note of approval. We ask especial attention to this opinion, which reviews the authorities, and here give an extract from it:

"We have given to this objection much consideration, as it was our duty to do, for the presiding Judge declined to instruct the jury that if the acts and words of the defendant's servant were not directly nor impliedly authorized nor ratified by the defendants, the plaintiff could not recover exemplary dam-

ages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified, for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempt, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a corporation. And yet under cover of its name and authority there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured who will not handle and smash trunks and band boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the Courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places and not before. It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing ex-

emplary damages. On the contrary we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest Courts in the country." (See page 28.)

An important distinction is also, in this case, taken between wantonness towards a passenger and like conduct towards a stranger, which will serve to reconcile some of the authorities upon this question of exemplary damages against railroad corporations. We quote briefly from another portion of the opinion. (See pp. 19 and 20.)

"Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that 'the master is not responsible as a tresspasser, unless by direct or implied authority to the servant he consents to the unlawful act.'

The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if a carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust."

See also, *Redfield on Railways*, 515 et seq.
Sherman & Redfield on Negligence, § 600.

The case of *New Orleans, Jackson & Great Northern R. R. Co. vs. Albritton*, 36 Miss., 242, is also directly in point, being a case of collision, the petition charging gross negligence, and the Court charging the jury, among other things, as follows:

"And may find exemplary damages provided the plaintiff received a bodily injury, and that injury was caused by gross negligence or wanton and willful misconduct of the engineer of the defendants."

The Court, after reviewing many authorities, having the benefit of lengthy briefs which are published with the opinion, held this instruction to be correct.

The same question again came before the Court in case of *New Orleans, Jackson & Great Northern R. R. Co. vs. Bailey*, 40 Miss., 395, and was warmly contested.

The Court, reviewing the subject, reaffirm the same doctrine.

See also, *V. & J. R. R. Co. vs. Patton*, 31 Miss. 156.
M. & C. R. R. Co. vs. Whitfield, 44 Miss., 466.

See also, *Louisville, Cinn. & Lex. R. R. Co., vs. Mahony*, 7 Bush., (Ky.) 235.
Atlantic & Gt. Western R. R. Co. vs. Dunn, 19 Ohio State, 162.
Pittsburgh & Ft. Wayne R. R. Co. vs. Slusser, 19 Ohio State, 157.
57 Penn. State, 339.
Baltimore & Ohio R. R. Co. vs. Blocher, 27 Md., 277.

In *Varillat vs. The New Orleans & Carrollton R. R. Co.*, 10 La An., 88, the Court place stress upon the fact that there was no evidence to explain the cause of the collision, and sustain exemplary damages.

The liability of railway corporations for exemplary damages for wilfull negligence is also recognized in Illinois.

Chicago & Rock Island R. R. Co. vs. McKean, 40 Ill., 218.
C., R. I. & P. R. R. Co. vs. Herring, 57 Ill., 59.
See also, *Spicer vs. C. & N. W. R. R. Co.*, 29 Wis., 580.

The right of recovery of exemplary damages has been expressly recognized by this Court.

Day vs. Woodworth, 13 Howard, 363.
See also *Philadelphia and Reading R. R. Co. vs. Derby*, 14 Howard, 468.

In Iowa the rule is also established that corporations are liable for exemplary damages for gross negligence.

See *Williamson vs. The Western Stage Co.*, 24 Iowa, 171. See also *Frick & Co. vs. Coe*, 4 G. Greene, 555.

And in connection with this decision, we call attention to the fact that the suit at bar was originally brought in the courts of that State, for an injury occurring in that State, and transferred by the defendant, Coe, to the United States Circuit Court. It appears to us that this fact should be entitled to weight in the discussion and decision of this case, otherwise defendant by the change might escape a liability actually fastened upon it by the laws and decisions of the State where the injury occurred.

Finally, upon this point we beg to refer the Court to the views of Judge Love, before whom this cause was tried in the Court below, as expressed in a former case tried before him involving the same question, the case with the opinion of the learned judge being reported in 1 Dillon's C. C. Reports at page 568, being the case of *Beale vs. The Railway Co.* The views of His Honor are here briefly but forcibly given and we believe will meet the approval of this Court.

II.

The only other error assigned, assails the direction of the Court to the jury respecting the verdict for the two plaintiffs. This objection is purely technical, and being only a matter of form should have been taken advantage of by proper plea before trial, instead of waiting until the whole cause was tried as to both plaintiffs and the jury instructed. This was too late to make this objection. If there was an improper joinder of actions it should have been taken advantage of before the trial of the cause. Indeed, the statute of the State of Iowa, under which the suit was commenced, it having been afterwards removed to the United States Circuit Court, expressly provided, Revision of 1860, of Iowa, Chap. 121, page 505, that all objections to the misjoinder of causes of action should be

deemed waived unless made before trial, and this whole chapter is adopted by the United States Circuit Court for Iowa, as a part of its rules. Not only so but the record shows, page 11 printed record, that when leave was asked by plaintiff to strike out the name of D. D. Armes, as co-plaintiff in first count of petition, that the cause was ordered to proceed accordingly, *i. e.* in the situation in which it was left after such leave was granted. The defendant, by failing to except or object, consented that it should so proceed, and he could not be heard after the case was submitted to the jury to object thereto.

Therefore, the conclusive answer to this objection is:

1. The objection is not available on appeal, being only one of form.

2. The objection came too late.

3. The order that the case should so proceed was not objected to by defendant.

4. The objection was waived because not made in time.

5. If error, it is without prejudice, and no prejudice is shown or claimed.

But lastly we insist that the causes of action might in the discretion of the Court have been tried together, and were properly so tried. There was but one person personally injured. The damage to the husband, D. D. Armes, depending on and growing out of the injury to the wife. And if she could not recover, clearly he could not, and it would seem to be also true, that if she could recover, he might also recover something, conceding them to be husband and wife.

Certainly there is nothing here to justify reversal.

C. C. NOURSE,
for Nourse & Kauffman,
Counsel for Defendants in error.

IN THE

Supreme Court of the United States.

MILWAUKEE AND ST. PAUL R. R. Co.
vs.
MARY A. F. ARMS AND D. D. ARMS. } No. 105.

Additional Brief for Defendants in Error.

AS TO THE QUESTION OF JURISDICTION.

1. In addition to the averment in the petition for removal, that Mary A. Arms is a citizen of Iowa, the petition states that the suit is a "controversy between a citizen of Iowa and a citizen of Wisconsin." As against the party removing the cause this will be taken to be an averment covering the question of citizenship of both the plaintiffs to the original suit.

See page 3 of record.

2. The defendants in error, plaintiffs in the original suit, filed a new petition in the Circuit Court after the removal of the cause, in which it is averred that both Arms and wife are citizens of Iowa, and that the railroad company was a citizen of Wisconsin, and obtained a rule on defendants to answer. The defendants appeared and answered this petition. This gave the court full jurisdiction, independent of the question of removal.

See page 6 of record.

Consent will give jurisdiction of the person where the parties are residents of different states. The railroad company first chose the circuit as the forum. Plaintiffs did not object, but filed their petition in that court, and the railroad company, without objection, answered and submitted to the jurisdiction, and cannot now take advantage of a defect in their own application.

3. The point is made that the court permitted the plaintiffs to strike the name of one of two joint plaintiffs from one of the counts of the petition, and "*then continued*" the whole suit jointly as to the rest of the action, but separately as to this one count.

This statement is a misapprehension of the record. The petition (we have no declarations in Iowa) contained two counts. The first count was a claim by husband and wife for damages accruing to the wife for her injuries. The second count was a claim by the husband alone for his damages resulting from injuries to his wife.

This joinder of action was brought in view of the provisions of section 2,775 of revision of 1860, which provided that "in an action brought by a man and wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to join thereto claims in his own right."

Subsequent to this statute, but before this suit was brought, the Legislature of Iowa so far changed the common law as to make it unnecessary to join the husband with the wife in a suit to recover damages enuring to her, and in view of this statute the husband's name was struck out of the first count in the petition, and the suit proceeded in the name of the wife as to the damages claimed in the first count, and in the name of the husband as to the damages claimed in the second count.

This amendment was proper and in the discretion of the court.

Section 2,977, Revision of 1860 of the Laws of Iowa, adopted by the Circuit Court, provides that "the court may, on motion of either party, at any time, in furtherance of justice, and on such terms as may be proper, permit such party to amend any pleading or proceeding by adding or *striking out* the name of a party," &c.

To this amendment and the orders of the court made there was no *objection* and no exception taken at the time, and it cannot here be considered.

As to the right of the wife to maintain this suit without joining the husband in the first count, see Act of 13 General Assembly of Iowa, ch. 176, as follows, sec. 11, page 208:

"A married woman may in all cases sue and be sued without joining her husband with her, except in cases where the cause of action exists in favor of both."

And the case of—

Pancoast vs. Burnell, 32 Iowa, 396.

See, also, chapter 126 of Act of 13 Genl. Assembly of the State of Iowa, page 168.

The husband still has his right of action for his own damages.

McKenney vs. Stage Co., 4 Iowa, 420.

As to separate judgments on the several counts of the petition we cite the following provisions of the statute:

Revision of 1860.

Sec. 3024.

"A separate trial between the plaintiff and any or all of several defendants may be allowed by the court whenever, in its opinion, justice will thereby be promoted."

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Sec. 3025.

"Where there are several causes of action united in a petition, or where in any controversy there are several issues, and the court shall be of opinion that all or any of them should be tried separately by the court or jury, it may direct such separate trial, &c."

Sec. 3123.

"Judgment may be rendered for or against one or more of several plaintiffs, and for or against one or more of several defendants, whether such plaintiffs or defendants be jointly or severally liable, and the court may determine the ultimate rights of the parties on the same side as between themselves, and may grant to any party an affirmative relief which he may be entitled to, and render judgment accordingly, and may render such and so many judgments, joint, separate, and cross, as may be necessary to express the rights of the parties."

This court will not review the action of the Circuit Court in refusing to grant a new trial.

The errors of law complained of were embraced in the motion for a new trial. The instruction as to the measure of damages had no influence on the minds of the jury, as the amount of the verdict did not cover actual damages. The Circuit Court heard all the evidence and knew the fact. The record does not bring the evidence before this court. How are you to say that exemplary damages were allowed?

The grounds on which the motion for a new trial was refused is not certified to this court.

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